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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR 27 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter of)

Computer III Further Remand Proceedings:)
Bell Operating Company Provision of)
Enhanced Services)

CC Docket No. 95-20

1998 Biennial Regulatory Review --)
Review of *Computer III* and ONA)
Requirements and Standards)

CC Docket No. 98-10

COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS
RESELLERS ASSOCIATION

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W., Suite 701
Washington, D.C. 20006
(202) 293-2500

March 27, 1998

Its Attorneys

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SUMMARY

The Telecommunications Resellers Association ("TRA"), a national trade association representing more than 650 entities engaged in, or providing products and services in support of, telecommunications resale, urges the Commission to differentiate between its long-standing category of "basic services" and the category of services defined by the Telecommunications Act as "telecommunications services." Rather than attempting to equate these two service categories, the Commission should view the former as a subset of the latter.

As the *Notice* acknowledges, Congress did "not utilize the Commission's basic/enhanced terminology" in crafting the Telecommunications Act. Instead, Congress elected to define "telecommunications" and "telecommunications services" far more broadly than the Commission had previously defined "basic services." Congress did so because the ends it was seeking to achieve in enacting the Telecommunications Act were very different from those the Commission hoped to realize in creating the "basic/enhanced dichotomy."

The Commission defined "basic service" so narrowly in order to establish "a regulatory demarcation between basic and enhanced services" which was "relatively clear-cut." The Commission drew a "bright line" between "basic" and "enhanced" service, narrowly defining the former, principally to free services other than basic transmission services from burdensome and unnecessary regulation. Unlike the Commission when it created the "basic/enhanced" dichotomy, the principal objective of Congress in defining "telecommunications services" was "to open[] all telecommunications markets to competition," including "opening the local exchange and exchange access markets to competitive entry." To this end, Congress directed incumbent LECs to make available for resale at wholesale rates all *telecommunications services* offered at retail. Resale, as

the Commission has recognized, is "an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks."

As the Commission has acknowledged, limiting the services available for resale will have "anticompetitive results." Defining the term "telecommunications services" narrowly will have the same "anticompetitive results" as the imposition of resale restrictions. If resale, consistent with the intent of Congress, is to be a viable entry strategy, particularly for smaller providers, it is imperative that incumbent LECs be required to make available for resale at wholesale rates all offerings which involve the transmission for a fee of information without change in its form or content, including services such as voice messaging services which have heretofore been classified solely as enhanced services.

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**COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits its Comments in response to the Further Notice of Proposed Rulemaking, FCC 98-8, released by the Commission in the captioned docket on January 30, 1998 (the "Notice"). In this proceeding, the Commission will "reexamine . . . [its] nonstructural safeguards regime governing the provision of information services by [the Bell Operating Companies ("BOCs")]," addressing in so doing "issues

¹ A national trade association, TRA represents more than 650 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services.

raised by the interplay between the safeguards and terminology in the . . . [Telecommunications Act of 1996 ("Telecommunications Act")]² and the *Computer III*³ regime." ⁴ TRA will limit its comments here to a single issue -- *i.e.*, the breadth of the term "telecommunications services" as defined in Section 153(51) of the Communications Act of 1934 ("Communications Act"), as amended by the Telecommunications Act.⁵

I. The Statutory Definition of "Telecommunications Services" is Substantially Broader Than the Commission's Definition of "Basic Services"

As the *Notice* acknowledges, Congress did "not utilize the Commission's basic/enhanced terminology" in crafting the Telecommunications Act.⁶ Instead, the Congress elected to define "telecommunications" and "telecommunications services" far more broadly than the Commission had previously defined "basic services." Congress did so because the ends it was

² Pub. L. No. 104-104, 110 Stat. 56 (1996).

³ Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), Phase I: 104 F.C.C. 2d 958 (1956), *recon.* 2 FCC Rcd. 3035 (1987), *further recon.* 3 FCC Rcd. 1135 (1988), *further recon.* 4 FCC Rcd. 5927 (1989), *rev'd sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Phase II: 2 FCC Rcd. 3072 (1987), *further recon.* 3 FCC Rcd. 1150 (1988), *further recon.* 4 FCC Rcd. 5927 (1989), *rev'd sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Computer III Remand Proceedings, 5 FCC Rcd. 7719 (1990), *recon.* 7 FCC Rcd. 909 (1992), *aff'd sub nom. California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd. 7571 (1991), *recon.* 11 FCC Rcd. 12513 (1996), *rev'd in part sub nom. California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied* 115 S.Ct. 1427 (1995).

⁴ Notice, FCC 98-8 at ¶ 5.

⁵ 47 U.S.C. § 153(51).

⁶ Notice, FCC 98-8 at ¶ 39.

seeking to achieve in enacting the Telecommunications Act were very different from those the Commission hoped to realize in creating the "basic/enhanced dichotomy."

The Commission has long defined "basic services" as the simple "offering of transmission capacity for the movement of information."⁷ In formulating this definition, the Commission declared that "a basic transmission service should be limited to the offering of transmission capacity between two or more points suitable for a user's transmission's needs."⁸ Thus, the Commission explained, "[i]n offering a basic transmission service, . . . a carrier essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information."⁹

The Commission defined "basic service" so narrowly in order to establish "a regulatory demarcation between basic and enhanced services" which was "relatively clear-cut." To this end, the Commission defined "enhanced services" as "any offering over the telecommunications network which is more than a basic transmission service."¹⁰ Thus, "enhanced services" were deemed to encompass a broad range of offerings:

In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other

⁷ Amendment of Sections 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, ¶ 93 (1980), *recon.* 84 F.C.C.2d 50 (1980), *further recon.* 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Association v. FCC*, 693 F.2d 198 (D.C.Cir. 1984), *cert denied sub nom. Louisiana Public Service Commission v. FCC*, 461 U.S. 938 (1983), *further recon.* FCC 84-190 (released May 4, 1984).

⁸ Id. at ¶ 95.

⁹ Id. at ¶ 96.

¹⁰ Id. at ¶ 97.

aspects of the subscriber's information. In these services additional, different, or restructured information may be provided the subscriber through various processing applications performed on the transmitted information, or other actions can be taken by either the vendor or the subscriber based on the content of the information transmitted through editing, formatting, etc. Moreover, in an enhanced service the content of the information need not be changed and may simply involve subscriber interaction with stored information. Many enhanced services feature voice or data storage and retrieval applications, such as in a "mail box" service. This is particularly applicable in time-sharing services where the computer facilities are structured in a manner such that the customer or vendor can write its own customized programs and, in effect, use the time-sharing network for a variety of electronic message service applications. Thus, the kinds of enhanced store and forward services that can be offered are many and varied.¹¹

The Commission drew a "bright line" between "basic" and "enhanced" service, narrowly defining the former, in order to achieve certain policy objectives. As articulated by the Commission, the distinction "draws a clear and . . . sustainable line between basic and enhanced services upon which business entities can rely in making investment and marketing decisions."¹² Moreover, the Commission added, "it removes the threat of regulation from markets which were unheard of in 1934 and bear none of the important characteristics justifying the imposition of economic regulation by an administrative agency."¹³ In short, the "basic/enhanced dichotomy" was created principally to free services other than basic transmission service from burdensome and unnecessary regulation.

¹¹ Id. (footnotes omitted).

¹² Id. at ¶ 101.

¹³ Id.

Although aware of the Commission's use of the term "basic services," as well as the Commission's narrow definition of that term, Congress opted instead to use the term "telecommunications service" and to provide that term with a broader definition. Congress defined "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."¹⁴ "Telecommunications," in turn, was defined by Congress as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."¹⁵ Accordingly, rather than being defined narrowly as a "pure transmission capability," "telecommunications services" were defined broadly to encompass all offerings involving the transmission for a fee of information without change in its form or content.

Because it defined "telecommunications services" broadly while at the same time retaining a broad view of "information services," the two definitions necessarily overlap. Certain services such as voice messaging services¹⁶ are arguably subsumed within both the "basic" and

¹⁴ 47 U.S.C. § 153 (51).

¹⁵ 47 U.S.C. § 153 (48).

¹⁶ As TRA demonstrated in its pending Petition for Declaratory Ruling seeking a declaration by the Commission that incumbent local exchange carriers are required, pursuant to Section 251(c)(4) of the Communications Act, to make voice messaging services available for resale at wholesale rates, voice messaging services, as offered by incumbent LECs are "telecommunications services" under the Congressional definition of that term. Incumbent LEC voice messaging services provide for the transmission of information from the calling party to the incumbent LEC's voice mail unit, and ultimately to the called party. The message the called party receives when he or she retrieves his or her messages is the same message, in both form and content, as the message

"enhanced" service categories.¹⁷ While the Commission has suggested otherwise, no where did

[footnote continued from preceding page]

delivered to the voice mail unit by the calling party. Hence, "information of the user's choosing" -- *i.e.*, the calling party's choosing -- is transmitted "between or among points specified by the user" -- *i.e.*, between the calling party and the voice mail unit and the called party -- "without change in the form or content of the information as sent and received." And, of course, voice messaging service is offered for a fee by incumbent LECs. See Public Notice, DA 98-520 (released March 17, 1998). See also MCI Telecommunications Corporation, Docket No. 961230-TP, Order No. PSC-97-0294-FOF-TP (Florida PSC March 14, 1997), *recon.* Order No. PSC-97-1059-FOF-TP (released Sept. 9, 1997):

Based on our interpretation of Sections 3 (51) and 3(48) of the Act, we believe that voice mail meets the definitions of "telecommunications" and "telecommunications service" under the Act. Voice mail is a transmission between or among points specified by the user. The transmitted information is of the sender's choosing and does not change in form or content when sent or received.

MCI Telecommunications Corporation, Docket No. 961230-TP, Order No. PSC-97-0294-FOF-TP (Florida PSC March 14, 1997).

The FCC's . . . ["classification of voice mail as an 'enhanced service'] was made prior to the enactment of the operative definitions used to establish resale obligations under the [Telecommunications] Act. Therefore, we believe that the requirements and definitions provided by the [Telecommunications] Act are the standards to be used in determining whether voice mail is subject to resale.

¹⁷ Contra Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, CC Docket No. 96-115, FCC 98-27, ¶ 72 (released Feb. 26, 1998). TRA urges the Commission to rethink its declaration that such services as "call answering, voice mail or messaging, and voice storage and retrieval services" constitute non-telecommunications 'services.' This view was articulated with the intent of better protecting customer proprietary network information ("CPNI"), a goal which can be achieved without unduly restricting the definition of the term "telecommunications service." But see, Consolidated Petitions of AT&T of the Midwest, Inc. MCImetro Access Transmission Services, Inc. and MFS Communications Company for Arbitration

[footnote continued on following page]

Congress declare "telecommunications services" and "information services" to be "separate, non-overlapping categories."¹⁸ Indeed, while the Senate, whose definition of "telecommunications services" prevailed in the Committee of Conference, made specific reference to the Commission's definition of "enhanced services" in defining "information services," it did not refer to the Commission's definition of "basic services" in defining "telecommunications services."¹⁹ Moreover, "[l]anguage that specifically stated that a telecommunications service did not include an information service was struck before the final definitions were adopted."²⁰

Unlike the Commission when it created the "basic/enhanced" dichotomy, the principal objective of Congress in defining "telecommunications services" was not to fence off emerging services from regulation. Rather, Congress' primary goal was "to open[] all telecommunications markets to competition,"²¹ including "opening the local exchange and exchange

[footnote continued from preceding page]

with U S WEST Communications, Inc., Docket Nos. P-442, 421/M-96-855, 421/M-96-909, 421/M-96-729 (Minnesota DPS Dec. 2, 1996) ("Enhanced services fall under the broad statutory definition of telecommunications services offered to the incumbent's end users. Labeling these services as information services does not take them out of the statutory category which must be offered for resale.")

¹⁸ Id. at ¶ 46.

¹⁹ S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 114 - 16 (1996) ("Joint Explanatory Statement").

²⁰ Letter to the Honorable William E. Kennard, Chairman, Federal Communications Commission, from Senators Stevens and Burns, dated January 27, 1998, filed in CC Docket No. 96-45 (definitions of "telecommunications services" and "information services" are "not mutually exclusive").

²¹ Joint Explanatory Statement at 113.

access markets to competitive entry."²² Critical to the realization of this goal was the "remov[al of] not only statutory and regulatory impediments to competition, but economic and operational impediments as well."²³ To this end, Congress directed incumbent LECs to make available for resale at wholesale rates all *telecommunications services* offered at retail.²⁴

Resale, as the Commission has recognized, is "an important entry strategy for small businesses that may lack capital to compete in the local exchange market by purchasing unbundled elements or by building their own networks."²⁵ Indeed, the Commission hypothesized that while resale would be "an important entry strategy . . . in the short term" for some new entrants "when they are building their own facilities," for others, especially small to mid-sized carriers, "the resale option . . . [would] remain an important entry strategy over the longer term."²⁶

As the Commission has acknowledged, limiting the services available for resale will have "anticompetitive results."²⁷ Thus, the Commission has declared "presumptively unreasonable"

²² Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 3 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom. Iowa Utilities Board v. FCC*, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *cert. granted sub. nom. AT&T Corp. v. Iowa Utilities Board* (Nov. 17, 1997), *pet. for rev. pending sub. nom., Southwestern Bell Telephone Co. v. FCC*, Case No. 97-3389 (Sept. 5, 1997).

²³ Id.

²⁴ 47 U.S.C. ¶ 251(c)(4).

²⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 907.

²⁶ Id.

²⁷ Id. at ¶ 939.

virtually all resale restrictions and conditions.²⁸ Defining the term "telecommunications services" narrowly will have the same "anticompetitive results" as the imposition of resale restrictions.²⁹ TRA thus submits that the term "telecommunications services" should be "interpreted in light of the pro-competitive policies underlying the 1996 Act" and read expansively to encompass all services which can be viewed as falling within its broad statutory definition.³⁰ As Senators Stevens and Burns recently declared:

All of the central provisions of the Telecommunications Act are applicable to 'telecommunications carriers' and the provision of "telecommunications services." If these new definitions are construed very narrowly, as the recent decisions of the Commission indicate, then the "major overhaul" of the Communications Act that Congress expected from the Telecommunications Act could turn out to be nothing more than a footnote in history.

Our greatest concern is that the Commission continues to apply concepts developed in an inflexible, monopoly environment to the flexible, post-local-monopoly world that the Telecommunications Act was intended to create. The Commission's continued classification of services as "enhanced" or "basic" could seriously undermine the competitive regime Congress sought to create.³¹

TRA, accordingly, urges the Commission to differentiate between "basic services" and "telecommunications services." Rather than attempting to equate these two service categories,

²⁸ Id.

²⁹ As the Commission has recognized, "[v]igorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs." Id. at ¶ 16.

³⁰ Id. at ¶ 949.

³¹ Letter to the Honorable William E. Kennard, Chairman, Federal Communications Commission, from Senators Stevens and Burns, dated January 27, 1998, filed in CC Docket No. 96-45

the former should be viewed as a subset of the latter. If resale, consistent with the intent of Congress, is to be a viable entry strategy, particularly for smaller providers, it is imperative that incumbent LECs be required to make available for resale at wholesale rates all offerings which involve the transmission for a fee of information without change in its form or content. services, including services such as voice messaging services which have heretofore been classified solely as enhanced services.

II. CONCLUSION

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with these comments.

Respectfully submitted,

TELECOMMUNICATIONS RESELLERS ASSOCIATION

By: _____

Charles C. Hunter
Catherine M. Hannan
HUNTER COMMUNICATIONS LAW GROUP
1620 I Street, N.W., Suite 701
Washington, D.C. 20006
(202) 293-2500

March 27, 1998

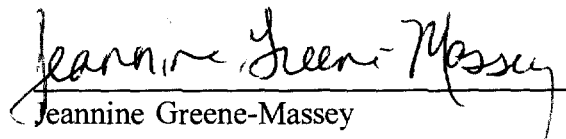
Its Attorneys

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I, Jeannine Greene-Massey, hereby certify that copies of the foregoing document were hand delivered this 27th day of March, 1998, to the following:

Ms. Janice Myles
Federal Communications Commission
Common Carrier Bureau
1919 M Street, N.W.
Room 544
Washington, DC 20554

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, DC 20036


Jeannine Greene-Massey